



## SUPREME COURT OF THE UNITED STATES.

SCHIAVONE-BONOMO CORPORATION,	}
<i>Petitioner,</i>	
against	
BOUCHARD TRANSPORTATION COMPANY, INC.,	}
<i>Respondent,</i>	
and	
BUFFALO BARGE TOWING CORPORATION,	}
<i>Respondent-Impleaded.</i>	

**BRIEF IN SUPPORT OF PETITION**

Schiavone-Bonomo Corporation, petitioner, made a contract with Bouchard Transportation Company to transport two cargoes of scrap iron and steel from two ports in New York to the Port of Buffalo, New York. This contract to transport and deliver goods, constituted a contract of af-freightment even though there was a towage service connected therewith.

*Sacramento Navigation Company v. Salz*, 273  
U. S. 326.

The Bouchard Transportation Company, apparently not having available equipment to carry out the contract it made with petitioner, entered into a contract with the Buffalo Barge Towing Corporation. This latter company furnished the barges and the tug which were to transport and deliver libellant's cargoes.

After the cargoes were placed aboard the barges, and during the course of the voyage, due to the faulty navigation of the tug and the barges, the tow struck the center abutment of a railroad bridge at Clyde, New York, on October 24, 1936. The contract of carriage, in so far as these

two sunken barges were concerned, was abandoned by the carrier, and the petitioner, through its representatives, raised the cargoes and carried them forward to destination, without the cargoes themselves being damaged. The petitioner was, however, required to incur extra expense in transporting the cargoes by reason of the breach of the contract by the carrier.

The petitioner instituted an action against Bouchard Transportation Company to recover the damages sustained, and this company sought to avoid liability by showing that it had made similar contracts with the Buffalo Barge Towing Corporation. It at no time has claimed that the petitioner was guilty of laches, nor that it had been prejudiced by any delay.

When the Buffalo Barge Towing Corporation appeared in the action, it offered the defense of laches, claiming that the following New York State statutes of limitation should be applied by analogy:

"S 49. Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:

"1. . . .

. . . . .

"6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence.

"7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article."

It is petitioner's contention that if, after showing prejudice by reason of delay, any New York State statute of limitations is to be applied by analogy, it should be one that deals with actions to be commenced within six years, which is as follows:

"S 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation express or implied, except a judgment or sealed instrument.

"2. \* \* \*

Upon the trial the respondents were able to produce all of their evidence, and made no contention of any prejudice by reason of delay. The status, rights, and obligations of the party were the same at the time of the trial of the action as they were at the time of the breach of the contract.

This action was brought *in personam*. Therefore, it did not seek to impose a lien on any vessel, which lien, it might be contended, would interfere with the rights of a third party. The District Court, both on its decision with respect to the exceptions filed to the libel and impleading petition, and on the trial of the action, found, as a fact, that none of the parties had been prejudiced by delay, and therefore the defense of laches had not been proved.

After the entry of the interlocutory decree, Buffalo Barge Towing Corporation, took an appeal solely from the decree on the question of the defense of laches (R. 100). Bouchard Transportation Company, Inc., did not take an appeal from the decree or file any cross-assignments of error as it was required to do by Rule XXXVIII of the Circuit Court of Appeals.

The Circuit Court of Appeals has held that the petitioner is barred from making recovery from either party by reason of the fact that the action was governed by the three-year statute of limitation of the State of New York, disregarding the equities and justice of the case, and whether or not either of the respondents had been prejudiced, which is contrary to the long and well-established rule respecting the defense of laches. In further applying

the New York State statute of limitation, it disregarded the requirements imposed by the laws of the State of New York before a defense of the statute of limitation can be available, as well as the defense of laches.

### POINT I.

**The decision of the Circuit Court of Appeals in holding that the petitioner could not recover because of the New York Statute of Limitations, and without consideration of the elements of the defense of laches, is in direct conflict with the decisions of this Court and the decisions in other circuits.**

There can be no dispute as to the well-known rule that there are no statutes of limitation in admiralty, and that the doctrine of laches is applied in lieu thereof.

In the present case, Buffalo Barge Towing Corporation interposed the defense of laches, setting forth the delay of the petitioner, and claiming that they were prejudiced in their rights. On the trial of the action they had the opportunity to offer a full and complete defense, and there was no evidence offered or contention made that they or the Bouchard Transportation Company, Inc., were prejudiced in any way by delay of the petitioner.

It has long been established in all of the Federal courts, that in considering the defense of laches, delay in and of itself is not sufficient to establish the defense, but it must be shown that together with the delay, the party offering the defense has been prejudiced or its status affected in some manner or other.

This action was brought *in personam*, and the petitioner did not seek to impose a lien upon any vessel of either of the respondents. In an action *in rem*, wherein a lien was sought to be imposed, this Court laid down the rule with respect to the defense of laches. In such an

action it is quite possible that the rights of third parties might be affected. There is no such possibility in an action brought *in personam*, such as was brought in the present case.

In *The Key City*, 14 Wall. 653, action was brought by a cargo owner against the carrying vessel, seeking to impose a lien upon the vessel by reason of its failure to deliver cargo. The defense of laches was interposed, and Mr. Justice MILLER, at page 659, in delivering the opinion of this Court, said:

“The authorities on the subject of lapse of time as a defense to suits for the enforcement of maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made, without specifying them more particularly. We think that the following propositions, as applicable to the case before us, may be fairly stated as the result of these authorities: (1) That, while the courts of admiralty are not governed in such cases by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will under proper circumstances, constitute a valid defense. (2) That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case. (3) That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under a shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued” (p. 189).

This rule has been consistently followed and observed by the Federal courts in the application of the defense of laches.

The Circuit Court of Appeals for the Second Circuit

followed this rule in the case of *Stiles v. Ocean Steamship Co.*, 34 Fed. (2d) 627 (C. C. A. 2), and held as follows:

“Last of all, defendant relies on the defense of laches. It is true that there was great delay in bringing suit, but there is no proof that the respondent was unduly prejudiced. \* \* \* There has been no showing here that witnesses have disappeared. We can discover no reason for holding laches a bar which would not apply to almost any suit that had not been brought for three or four years after the cause of action arose. Respondent may have thought that *Stiles & Co.* had delayed so long that it had dropped its claim, but this circumstance alone cannot limit the latter’s right.”

Various other Circuits and District courts have also for many years laid down this rule.

#### THIRD CIRCUIT

This rule has been laid down by the Third Circuit in the case of *Loverich v. Warner Co.*, 118 Fed. (2d) 690 (C. C. A. 3).

#### FIFTH CIRCUIT

This Circuit laid down the same rule in the case of *The Gertrude*, 38 Fed. (2d) 946; 1930 A. M. C. 823 (C. C. A. 5).

#### NINTH CIRCUIT

This same rule was again set forth by this Circuit in the case of *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180 (C. C. A. 9).

It is also set forth in the District Court of the Eastern District of Louisiana, in the case of *Coburn v. Factors' & Traders Ins. Co.*, 20 Fed. 644, and in the case of *Texas Co. v. Steamtug Independent*, 37 Fed. Supp. 106; 1941 A. M. C. 524, reversed on other grounds, 122 Fed. (2d) 141 (C. C. A. 5).

In *Pan-American Trading Co. v. Franquiz*, 8 Fed. (2d) 500 (C. C. A. 9), the District Court for the Southern District of Florida, again set forth the same rule.

In *Great Lakes Transportation Co. v. Hand & Johnson Tug Line*, 289 Fed. 130, the District Court for the Eastern District of Michigan, again set forth the same rule.

From the cases heretofore enumerated, it appears that the law with respect to the defense of laches has been not only established for some time, but has been clearly set forth by numerous Federal courts.

In the present case, the Circuit Court of Appeals for the Second Circuit has, by its decision, changed the well-known doctrine of laches, and is now in conflict with the law as laid down by this Court, as well as other Circuit courts and District courts.

Neither the Buffalo Barge Towing Corporation, which offered the defense of laches, nor the Bouchard Transportation Company, Inc., which did not interpose the defense, have at any time, either during the trial or on the appeal to the Circuit Court of Appeals, contended that they were in any way prejudiced by any delay, or was their status with respect to this claim changed by reason of the delay.

Prior to the decision in the present case, the Circuit Court of Appeals for the Second Circuit clearly expressed itself with respect to the defense of laches and delay, in the case of *The Fulton*, 54 Fed. (2d) 467; 1932 A. M. C. 232 (C. C. A. 2). In that case the Court held that there had been an extraordinary delay, as the libel to recover damage to property was filed more than four years after the collision, which occurred nearly ten years before the decision. The Court stated as follows:

“• • • In spite of the absence of any explanation, we cannot see that the delay *ipso facto* should defeat the claim. Although one of the claimant's witnesses died before trial, this was misfortune whose consequences cannot be pressed so far. The decree gives interest only from its date as we understand it; this is all the penalty we can impose” (p. 236).

## POINT II.

**If a New York State Statute of Limitation is to be applied by analogy, it should be the one governing contract actions, as in applying the doctrine of laches in admiralty, an analogy to a state statute of limitations is only an analogy and not a rule.**

The Circuit Court of Appeals, in applying the New York three-year statute, is in conflict with other Circuits.

Federal courts have repeatedly held that a private carrier is free to enter into any contract which it may deem fit, and that his rights and obligations are determined by the contract.

That the rights and obligations of the parties to this action are based on contract, is shown by the case of *Commercial Molasses Corporation v. New York Barge Corporation*, 314 U. S. 104. In that case damages were sought by reason of the breach of the contract of carriage by a private carrier which owned the carrier vessel, and which resulted in a loss and damage to cargo. This Court held that the duties of the parties were based on the contract as follows:

“But as the court below held, the bailee of goods who has not assumed a common carrier’s obligation is not an insurer. His undertaking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of recovery which he seeks.”

The Bouchard Transportation Company contracted with petitioner to transport and deliver at Buffalo, New York, petitioner’s cargoes. When the barges on which petitioner’s cargoes were laden sunk in the New York State Barge Canal, the Bouchard Transportation Company abandoned

the voyage and the contract. In order for the petitioner to have the cargoes delivered at destination as was contemplated and provided by the contract, it was necessary that the petitioner raise and transport the cargoes to destination. It was solely due to the breach of contract that the petitioner was required to incur this extra expense, and if any statute is to be applied by analogy, disregarding for the time being that no one was prejudiced, it is submitted that the statute governing contract actions is the one to be considered.

In *The Kermit*, 76 Fed. (2d) 363 (C. C. A. 9), an action was brought by a cargo owner against the carrier vessel for damages sustained by cargo. The defense of laches was interposed, and the Court held as follows:

“As the decisions indicate, the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion.

\* \* \* \* \*

“The California Code of Civil Procedure, S 337, provides that an action on a contract obligation or liability founded upon an instrument in writing must be commenced within four years. The District Court, by analogy, adopted the statute in determining that libellants were guilty of laches.”

This case shows that the Ninth Circuit has clearly held that in a contract of carriage by water, where action is brought by the cargo owner for a breach thereof, any State statute of limitations to be applied by analogy is that statute which governs action by contract.

The holding of the Circuit Court of Appeals in the present case is in conflict with the holding of the Ninth Circuit in *The Kermit*.

The Circuit Court of Appeals for the Second Circuit, considering the question of the limitation of time within which to bring an action, set forth the law, with respect

to a breach of contract of carriage by a water carrier and the abandonment of the voyage, in the case of *Corporation of the Royal Exchange Insurance v. United States, et al.*, 75 Fed. (2d) 478. In that case the Court, quoting Prof. Williston, held:

“ ‘A distinction between unexcused inability to perform and willful intention not to perform is not of practical value. As far as performance of the contract is concerned they are of equal effect and should be followed by the same consequences.’ ”

In considering whether or not the carrier may take advantage of a State statute of limitation, it is necessary to consider the rights of such a carrier to take advantage of a limitation statute such as the Harter Act or the Limitation of Liabilities Statutes, both of which are Acts of the United States. This Court has held that a private carrier is free to make such terms as it may agree upon, and its rights and obligations are dependent upon the contract. Under the private carrier's contract, the carrier warrants seaworthiness of the vessel. This warranty is part of the personal contract, whether it is expressly incorporated in the contract or not. If a private carrier desires to have the benefit of the Harter Act, he must so provide in the contract of carriage, and this right is dependent solely upon the contract. If the private carrier does so provide in his contract, and fails to use due diligence to make his vessel seaworthy, then he would be guilty of negligence. However, the reason that he is denied the benefits of the Harter Act depends upon his contract.

This was held in the case of *Koppers Connecticut Coke v. James McWilliams Blue Line, Inc.*, 89 Fed. (2d) 865 (C. C. A. 2), certiorari denied 302 U. S. 706, 82 L. Ed. 545.

In cases involving private carriers' rights to limit liability, it has been consistently held that where there is a breach of warranty of seaworthiness, either implied or express, the carrier cannot limit its liability. The reason

for the denial of right of limitation of or exoneration from liability, is based upon the breach of the personal contract of the carrier. This rule has been laid down and following in the following cases:

*Cullen* 32, 62 Fed. (2d) 68 (C. C. A. 2); affirmed  
290 U. S. 82, 78 L. Ed. 189;

*The Loyal*, 204 Fed. 930 (C. C. A. 2);

*The Jungshoved*, 290 Fed. 733 (C. C. A. 2), 1923  
A. M. C. 630.

The rights of limitation of liability of a carrier sought in these cases was dependent solely upon the contract of carriage. Therefore, it should follow that the right to escape liability by reason of a State statute of limitations, is also dependent upon the contract.

From a reading of the New York State Statutes of Limitations with respect to actions which should be commenced within three years, and those which should be commenced within six years, it can be readily seen that the legislature intended that any action upon a contract obligation, express or implied, should be begun within six years, and by the way the words "contract obligation" as set forth in the statute, it would appear that the word "obligation" included duties imposed by contract and law, irrespective of whether or not the breach of obligation included negligence. That this must be so is shown by Section 49 of the New York Civil Practice Act. That section simply provides that it is not to apply in a case where a different period is expressly prescribed in the article. The article expressly provides for damages or injuries to property, or for damages resulting from a breach of a contract obligation, whether express or implied.

The three-year statute of limitation which the Circuit Court of Appeals has found applies to the present case has reference to damage for injury to property. In the present case the property involved, which was the cargoes

of scrap iron and scrap steel, were not damaged by its contact with water. Petitioner, however, was damaged by reason of the extra expense which it was caused to incur by reason of the abandonment of the voyage and the contract by the carrier. The Circuit Court of Appeals in its opinion has referred to this contention of the petitioner. It also sets forth the statute of New York which defines injury to property, and then finds that through the acts of the New York State legislature, this definition is not to apply to the New York Civil Practice Act. They then hold that they have no hesitation in finding that the sunken scrap iron was an injury to property. They are correct in one circumstance, in that the barge was damaged, but as was testified to by petitioner's witnesses, the property was not damaged or injured.

### POINT III.

**The application by the New York State Statute of Limitations by the Circuit Court of Appeals is in conflict with the law of the State of New York, as well as with the laws of the Federal courts.**

That the New York State Statute of Limitations in and of itself did not extinguish libellant's cause of action, is clear, and that the Statute of Limitations as applied by the Circuit Court of Appeals, assuming that they applied the correct one, is merely a statute of repose is shown by the following cases:

*Campbell v. Holt*, 115 U. S. 620; 29 L. Ed. 483;  
*Hulbert v. Clark*, 128 N. Y. 295.

Before a party may have the benefit of the New York Statute of Limitations, it must plead it as a defense. This requirement is not only made by the New York Civil Practice Act, but by the laws of the State of New York. It was

not so pleaded by Bouchard Transportation Company, Inc.

The New York Civil Practice Act provides by Sections 242 and 261 as follows:

"S. 242. CERTAIN FACTS TO BE PLEADED. The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated. (New.)"

"S. 261. CONTENTS OF ANSWER. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim. (As amended by L. 1921, ch. 372, October 1. Code S. 500.)"

That a statute of limitations is not available as a defense unless it is pleaded, has been consistently held by the courts of the State of New York, as well as the Federal courts of the United States, in the following cases:

*Sanger v. Nightingale*, 122 U. S. 176, 30 L. Ed. 1105;

*Gill v. Frances Inv. Co.*, 19 F. (2d) 880 (C. C. A. 9);

*Green Star S. S. Co. v. Nanyang Bros. Tobacco Co.* (C. C. A. 9) 3 F. (2d) 369;

*American Linseed Co. v. Norfolk & North American Steam Shipping Co. Ltd.*, 32 F. (2d) 281;  
*United States v. Alex Dussel Iron Works, Inc.*, 31 F. (2d) 535 (C. C. A. 5);  
*American Merchant Marine Ins. Co. of N. Y. v. Tremaine*, 269 Fed. 376 (C. C. A. 9);  
*Lindlots Realty Corp. v. Suffolk County*, 278 N. Y. 45;  
*Locke v. Pembroke*, 280 N. Y. 430;  
*Nasaba Corp. v. Harfred Realty Corp.*, 287 N. Y. 290;  
*Douglass v. Ferris*, 138 N. Y. 192;  
*Selegson v. Weiss*, 227 N. Y. S. 338, 222 App. Div. 634.

That the statute is waived unless pleaded, is specifically shown by the following cases:

*Liquid Veneer Corp. v. Smuckler*, 90 F. (2d) 196 (C. C. A. 9);  
*Supreme Forest Woodmen Circle et al. v. City of Belton, Tex.*, 100 F. (2d) 655 (C. C. A. 5);  
*Rich v. Bray*, 37 Fed. 273 (C. C. Mo.);  
*Bartles v. Gibson*, 17 Fed. 293 (C. C. Wis.);  
*In re Southshore Cooperative Assn.*, 23 Fed. Sup. 743; affirmed 103 F. (2d) 336 (C. C. A. 2);  
*Hayden v. Pierce*, 144 N. Y. 512;  
*Hamilton v. Royal Insurance Co.*, 156 N. Y. 327;  
*Dunkum v. Maceck Bldg. Corp.*, 237 N. Y. S. 180, 227 App. Div. 230;  
*Richardson v. Gregory*, 219 N. Y. S. 397, 219 App. Div. 211; affirmed 245 N. Y. 540.

The defense of the statute of limitations may not be raised for the first time on appeal.

- Retzer v. Wood*, 109 U. S. 185, 27 L. Ed. 900;  
*Bardon v. Land & River Improvement Co.*, 157  
 U. S. 327, 39 L. Ed. 719, affirming 45 Fed.  
 706;  
*Ferryboatmen's Union of California v. North-*  
*western Pacific R. R. Co.*, 84 F. (2d) 773  
 (C. C. A. 9);  
*Ashton v. Glaze*, 95 F. (2d) 427 (C. C. A. 9);  
*Provident Life & Trust Co. of Philadelphia v.*  
*Camden & T. Ry. Co.*, 177 Fed. 854 (C. C. A.  
 3);  
*Johnsonburg Vitrified Brick Co. v. Yates*, 177  
 Fed. 389 (C. C. A. 3);  
*Faburn v. Dimon*, 47 N. Y. S. 227, 20 App. Div.  
 529;  
*City of New York v. Coney Island Fire Dept.*,  
 18 N. Y. S. (2d) 923; affirmed 285 N. Y. 535;  
*Lindlots Realty Corp. v. Suffolk County*, 296  
 N. Y. S. 599, 251 App. Div. 340, affirmed 278  
 N. Y. 45.

The same ruling also applies to the defense of laches.

- Ashton v. Glaze*, 95 F. (2d) 427 (C. C. A. 9);  
*Ferryboatmen's Union of California v. North-*  
*western Pacific R. R. Co.*, 84 F. (2d) 773  
 (C. C. A. 9);  
*American Merchant Marine Ins. Co. of N. Y. v.*  
*Tremaine*, 269 Fed. 376 (C. C. A. 9);  
*Douglass v. Ferris, et al.*, 138 N. Y. 192;  
*Selegson v. Weiss*, 227 N. Y. S. 338, 222 App.  
 Div. 634.

From the foregoing, the respondent-appellee, Bouchard Transportation Company, Inc., cannot now claim that the libellant's action and right of recovery is barred by the Statute of Limitations or laches. When the libel was dis-

missed as to the Buffalo Barge Corporation, then the Bouchard Company became primarily liable.

In *The Tommy*, 39 F. (2d) 577 (C. C. A. 2), an action was brought by a lighter owner against the charterer to recover damages caused to the lighter while under charter.

The charter impleaded the stevedore alleging that the stevedore company was responsible for the damage. The District Court entered a decree primarily against the stevedore company and secondarily against the charterer of the scow by reason of its failure to return the scow in the same condition as when received. The Court modified the decree of the District Court and exonerated the stevedore and company and held the charterer liable primarily. The Court held in a *per curiam* opinion at page 578, as follows:

“The contract of hire imposed liability on the Cummings Lighterage & Transportation Company for failure to return the barge in as good condition as received, ordinary wear and tear excepted, and it was held for breach thereof below. It has not appealed. Reversing the decree against the Chiarello Stevedoring Company, Inc., imposes primary liability upon it.

“The decree will be reversed as to the defendant the Chiarello Stevedoring Company, Inc., and the Cummings Lighterage & Transportation Company now becomes primarily liable for the damages.

“Decree modified.

“On Motion for Rehearing.

“*PER CURIAM.*

“Edward E. Cummings has moved for a rehearing on the ground that the record cannot sustain the decree against him and that he has had no day in court upon the issue decided.

“The decree appealed from adjudged that the libellant recover its damages primarily of Chiarello Stevedoring Company and secondarily of Cummings. The opinion of the District Court found, in accordance with the allegation of the libel, that by the

terms of the charter Cummings agreed to return the barge at the termination of the charter agreement in the same order and condition as received, ordinary wear and tear excepted. This finding was doubtless based upon a stipulation, as no evidence was introduced as to the terms of the charter. The stipulation reads:

“‘Incorporation and ownership and the charter in good condition and return in damaged condition is admitted by all parties on the record.’

“Cummings now says that the allegation of the libel as to the contract of hire was neither litigated nor proved. But he made no motion in the court below to be relieved of his stipulation, and, although a decree had gone against him, he took no appeal, assigned no errors in this court, and filed no brief. He was apparently willing to allow the decree against him to stand, however erroneous, in the expectation that the stevedoring company would have to pay it. Being disappointed in that expectation he asks, after it has been affirmed, for a retrial. We think the request comes too late. Rule 37 requires an appellee who desires other relief than that granted by the decree to file an assignment of errors. No adequate reason is advanced for not enforcing the rule in the present case.”

### LASTLY.

**It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.**

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